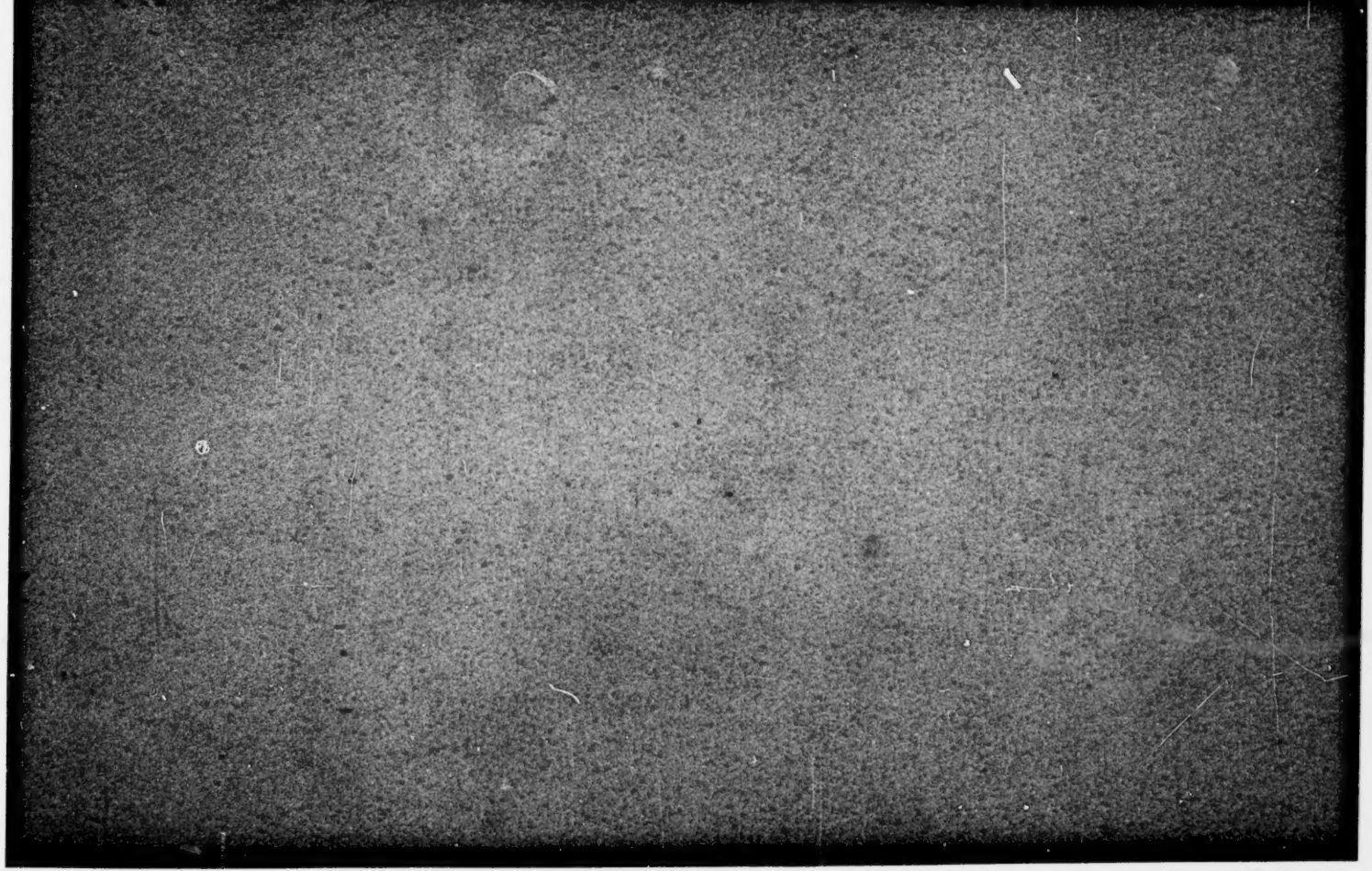

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

[redacted]

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICK R. MARCIANO, and JOAQUIN P. VILLAGOMEZ,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; ROGERS C. B. MORTON, Secretary of Interior; STANLEY S. CARPENTER, Director of the Office of Territories of the Department of the Interior; EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands,
Respondents,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition for Respondent Continental Air Lines, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 72-644

THE PEOPLE OF SAIPAN, by and through HERMAN Q. GUERRERO, LINO M. OLOPAI, DAVID T. ALDAN, JESUS A. SASAMOTO, JUSTIN S. MANGLONA, NICK SANTOS, BEN A. GUERRERO, JOHN ROSARIO, RICK R. MARCIANO, and JOAQUIN P. VILLAGOMEZ,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; ROGERS C. B. MORTON, Secretary of Interior; STANLEY S. CARPENTER, Director of the Office of Territories of the Department of the Interior; EDWARD E. JOHNSTON, High Commissioner of the Trust Territory of the Pacific Islands,
Respondents,

and

CONTINENTAL AIRLINES, INC., a Nevada Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition for Respondent Continental Air Lines, Inc.

OPINIONS BELOW

The majority opinion of the Court of Appeals and the separate opinion of Judge Trask concurring in the result (collectively Appendix B of the Petition) are now reported at 502 F.2d 90.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is approval by the government of the Trust Territory of the Pacific Islands of a lease for construction of a private hotel on the island of Saipan subject to the U. S. National Environmental Policy Act?

2. Is the High Court of Micronesia the appropriate forum for determination of a suit first commenced there by Trust Territory citizens to review actions of the Trust Territory Government?

STATUTES AND REGULATIONS INVOLVED

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 is set out as Appendix C to the Petition. The Trusteeship Agreement (61 Stat. 3301), 48 U.S.C. § 1681(a), Executive Order No. 11021 and Department of the Interior Order No. 2918 are set out in Appendix D to the Petition. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, is set out as Appendix 1 to this Brief in Opposition.

STATEMENT OF THE CASE

This lawsuit arises from approval by the Government of the Trust Territory of the Pacific Islands (Micronesia) of a 30-year lease of public land to respondent Continental for construction of a resort hotel adjacent to Micro Beach on the Micronesian island of Saipan.[1] Petitioners, Micro-

1. Though the Micronesian island system ranges over three million square miles of ocean, its total land area is 687 square miles. Only 64 of the some 2,000 islands are regularly inhabited (Trust Territory of the Pacific Island 1960, 13th Annual Report of the United Nations [Dept. of State publication 7183, 1961]).

nesian citizens, seek to restrain construction of the hotel and use of the land by Continental. Relief was denied at all stages below.

Since 1947 the United States has had administrative responsibility for Micronesia under a Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301 (1947), executed between the United States and the United Nations. Petition, Appendix D, 57a. The United States is, however, not sovereign there, and the Trust Territory is neither a territory, possession nor dependency of the U. S.

The Trusteeship Agreement obligates the United States in part to "promote the development of the inhabitants of the trust territory toward self-government or independence" as is appropriate to local conditions and wishes and progressively to increase participation in government by the native peoples. Trusteeship Agreement, Art. 6(1). Accordingly, a republican form of government has been established there, including executive and judicial branches and an indigenously elected legislature. Dept. of Interior Order No. 2918, Parts II-IV (Petition, Appendix D, 65a). Though the chief executive officer, the High Commissioner, is presently appointed and subject to technical supervision by U.S. officials,[2] the local government operates substantially autonomously in domestic affairs.

Important changes in U.S.-Micronesian relations are expected to result from current political status talks between the two peoples. See discussion *infra*.

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2. Pending its further provision therefor, Congress has empowered the President to delegate responsibility for U.S.—Trust Territory relations as he chooses. 48 U.S.C. § 1681(a) (Petition, Appendix D, 61a). Pursuant to Executive Order No. 11021, 3 C.F.R. 1959-63 Comp. at 600 (May 7, 1962) (Petition, Appendix D, 61a), that responsibility now rests with the Secretary of Interior and his designates. The High Commissioner is appointed by the President with the advice and consent of the Senate. 48 U.S.C. § 1681a.

Petitioners argue here, as they did below, that approval of the lease by the Trust Territory Government was a significant "Federal action" of a "Federal" agency undertaken in violation of § 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), since no "environmental impact statement" (EIS) was prepared and considered.

That contention has been uniformly rejected by the three separate courts to which it has already been presented.

Many of these petitioners first sought to enjoin construction of the hotel by commencing suit against Continental and the High Commissioner in the High Court of Micronesia. *Guerrero, et al. v. Johnston, et al.*, No. 1064 (1972). There, both NEPA and causes of action based upon local law were raised. The court's Trial Branch declined to grant in full defendants' motion to dismiss but, in an interlocutory opinion and order, determined that NEPA was inapplicable to actions of the Trust Territory Government. Petition, Appendix B, 34a, n. 6.

Thereupon, while the High Court suit was still pending, petitioners commenced this action in the U. S. District Court for Hawaii.[3] Again petitioners claimed that approval of the lease had violated NEPA. Additionally, they asserted that the High Commissioner's actions were independently reviewable by the Federal courts against the Trusteeship Agreement itself.[4]

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3. The High Court, by its order dated January 28, 1973, stayed all proceedings there pending final judgment in the Federal action.

4. Unlike the territories and possessions of the United States (other than Samoa), the Trust Territory is not within the territorial jurisdiction of any Federal District Court. 28 U.S.C. §§ 81-131, 48 U.S.C. § 1424, including the District of Hawaii. 28 U.S.C. § 91.

Petitioners' motion for a temporary restraining order was denied. Subsequently, respondents' motions to dismiss were granted. The District Court, in an opinion by Judge Samuel P. King, concluded that it lacked subject matter jurisdiction since (1) the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA), excluded the Trust Territory Government from review by the Federal courts, (2) the lease approval was not a "Federal" action of a Federal "agency" for purposes of NEPA, and (3) the Trusteeship Agreement did not create independent rights capable of judicial enforcement. Petition, Appendix A. In disclaiming the "Federal" nature of the lease approval, the District Court found specifically that Interior Department officials had not participated in any way in the decision to grant the lease. *Id.* The District Court denied an injunction pending appeal, as did the Court of Appeals.

On the merits, the Court of Appeals, in another extensive opinion, affirmed the District Court's conclusion that acts of the Trust Territory were not reviewable by Federal courts under the APA and NEPA. However, the Court found that the Trusteeship Agreement itself created standards of conduct for Trust Territory officials which could be judicially enforced by Micronesian citizens. Acting on principles of comity, the Court held that enforcement of these rights should first be sought in the High Court of Micronesia. Petition, Appendix D. If that court declined to take jurisdiction, petitioners were to be permitted to refile their suit in the District Court of Hawaii. *Id.*[5]

REASONS FOR DENYING THE PETITION

This case presents the most compelling grounds for denial of the petition for certiorari. The Court of Appeals

5. Construction of the hotel had begun prior to commencement of any litigation and has been largely completed during its two-year pendency.

has correctly decided the matter. There is no conflict among the lower Federal courts on the issues presented. Most importantly, the facts and issues of this case are particularly anomalous and inappropriate for intervention by this Court now.

1. The Court of Appeals Correctly Decided That NEPA Does Not Apply to Local Actions of the Trust Territory Government.

NEPA's requirement that an EIS be prepared and considered is applicable only to "major Federal actions" by "agencies of the Federal government." 42 U.S.C. § 4332. The Court of Appeals found the District Court's decision that NEPA did not apply to this lease to be correct and supportable on at least four separate grounds:

> (1) that the APA's exclusion of the "governments of the territories and possesions of the United States" from judicial review as Federal "agencies", 5 U.S.C. § 701(b)(1)(C), applied to the government of the Trust Territory and established that the NEPA reference to Federal "agencies", 42 U.S.C. § 4332(2)(C), also excluded the Trust Territory Government. Petition, Appendix B, 31a-32a.
>
> (2) that Congress had not legislated, pursuant to Article 12 of the Trusteeship Agreement, to make NEPA applicable to the Trust Territory Government. Petition, Appendix B, 34a and n. 6.
>
> (3) that there was no participation by Interior Department officials in the decision to grant the lease. Petition, Appendix B, 33a.
>
> (4) that the strong impetus for increased self-government provided by the Trusteeship Agreement,
>
> ". . . constrains us not to hold that the actions of the local government are reviewable in the same manner as the actions of domestic federal administrative agencies, in a federal district court several thousand miles from the islands." Petition, Appendix B, 33a.

That the APA exempts the Trust Territory Government from review as a Federal "agency" is virtually indisputable. Congressional sponsors of the APA (enacted prior to execution of the Trusteeship Agreement) made clear that the exclusions from the definition of "agency' contained in § 701 of the Act were conceived on broad and functional lines. 92 Cong.Rec. 2150 (1946); H.R.Rep.No. 1980, 1946, U.S. Code Cong. & Ad. News 1195, 1205. In insulating the governments of territories and possessions from review as Federal agencies, Congress manifestly intended to encompass all functionally analogous governments created pursuant to Congressional authority.

Petitioners offered no persuasive argument to the contrary in either court below.

Similarly, petitioners advanced no credible reason why the same rules on the scope of review should not apply to NEPA, which, like the APA, is expressly concerned with Federal "agencies". Both courts predictably concluded that since the Trust Territory Government is not subject to Federal court review as a Federal "agency" at all, *a fortiori* it is not subject to review as a Federal "agency" for purposes of NEPA. Petition, Appendix A, 22a; Appendix B, 31a-32a.[6]

The Court of Appeals also rejected petitioners' suggestion that the High Commissioner is bound by the Trusteeship Agreement to follow NEPA. Article 12 of the Trusteeship Agreement empowers the United States "to enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory."

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6. Both courts rightly perceived that this result could not be altered by characterizing the High Commissioner as a Federal "official" or "agent" subject to NEPA, separate and apart from the Trust Territory Government as a whole. Petition, Appendix A, 21a-22a; Appendix B, 33a. Were it otherwise, the APA exclusion of territorial governments from review as Federal "agencies" would be meaningless.

Petition, Appendix D, 60a. The Court found no intention by Congress to legislate pursuant to Article 12 to make NEPA applicable to the Trust Territory Government. Petition, Appendix B, 34a and n. 6.[7]

Moreover, evidence presented to the District Court on two occasions established that, in fact, the Trust Territory Government and the High Commissioner operated autonomously and without Interior Department participation in deciding to grant the lease. From the record before it, the District Court found that:

> ". . . officials of the Interior Department did not negotiate, counsel, advise or participate in the decision. Nor was the lease ever sent to the Department for approval or concurrence in any form. . . ." Petition, Appendix A, 22a, n. 28.

The Court of Appeals implicitly affirmed this determination. Petition, Appendix B, 33a.[8]

Finally, the Court of Appeals pointed to the Trusteeship Agreement's mandate for increasing autonomy for Micronesia and the evolving nature of the Trust Territory's relationship with the United States. Wisely, it decided that the

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7. Equally appropos is Article 3, which empowers the United States to apply to the Trust Territory, subject to any desired modification, "such of the laws of the United States as it may deem appropriate to local conditions and requirements." Petition, Appendix D, 56a. The "local conditions and requirements" of Micronesia do not necessarily admit of a statutory scheme designed for the U.S. government establishment. Articles 3 and 12 make clear that U.S. laws do not apply to the Trust Territory Government in the absence of a specific expression of Congressional intent.

8. Petitioners complain strenuously that the District Court improperly permitted introduction of evidence on a motion to dismiss without treating the motion as one for summary judgment under Rule 56(c), Fed.R.Civ.Pro., and without affording petitioners an adequate opportunity to demonstrate participation by Interior Department officials in the lease decision. Petition, 12. Assuming without conceding that this was error, it was harmless, since the Court of Appeals' conclusions that NEPA is inapplicable do not stand or fall upon that issue.

Federal courts, widely removed from these far-flung islands and facing a rapidly changing political situation there, were not the appropriate primary forum for resolution of questions about the activities of the local government. Petition, Appendix B, 33a.

In holding the Trust Territory Government itself immune from review under the APA and NEPA, the Court of Appeals carefully analyzed and distinguished such cases as *People of Eniwetak v. Laird*, 353 F.Supp. 811 (D.Hawaii 1973) (holding NEPA applicable to an agency of the executive branch of the United States government, the Air Force Department, operating directly inside the Trust Territory); *Bell v. Commissioner*, 278 F.2d 100 (4th Cir. 1960); *Kam Koon Wan v. E. E. Black, Ltd.*, 188 F.2d 558 (9th Cir.), *cert. denied*, 342 U.S. 826 (1951) (holding governments of United States territories to be agencies of the Federal Government for purposes of income taxation and the Portal-to-Portal Act, respectively); *Callas v. United States*, 253 F.2d 838 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958); *Brunell v. United States*, 77 F.Supp. 68 (S.D.N.Y. 1948) (both holding Trust Territory not to be a part of the U.S. for purposes of Federal Tort Claims Act); and *Richard W. Benfer*, 45 T.C. 277 (1965) (holding the Trust Territory not to be a U.S. territory or possession for purposes of income taxation).[9]

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9. See also *Aradanas v. Hogan*, 155 F.Supp. 546 (D.Hawaii 1957); *Application of Reyes*, 140 F.Supp. 130 (D.Hawaii 1956) (both holding Trust Territory not a part of United States for purposes of Immigration and Nationality Act); and *Pauling v. McElroy*, 164 F.Supp. 390 (D.D.C. 1958), *aff'd on other grounds*, 278 F.2d 252 (D.C.Cir.), *cert. denied*, 364 U.S. 385 (1960) (holding Trust Territory citizens without standing to seek Federal court review of constitutionality of proposed Marshall Islands nuclear tests). Both opinions below note that no Federal court has heretofore undertaken review of activities of the Trust Territory Government as a Federal "agency". Petition, Appendix A, 19a; Appendix B, 32a.

On the other hand, the Court gave weight to a recent Court of Claims decision, *Porter v. United States*, 496 F.2d 583 (Ct.Cl. 1974), virtually on point with this case. Petition, Appendix B, 32a, n. 5. *Porter* held that a contract negotiated and administered by the Trust Territory Government was not that of a Federal "agency", and that a direct suit against the United States could therefore not be maintained for its breach. If the word "lease" is substituted for "contract" in the Court of Claims decision, its holding and that of both lower courts here are identical.

The courts below correctly determined that neither the Trust Territory Government or its individual functionaries are Federal "agencies" for purposes of NEPA.

2. The Court of Appeals Correctly Decided That the High Court of Micronesia Is the Appropriate Forum for Initial Review of the Lease Approval.

Petitioners assert that the Court of Appeals erred fundamentally by referring the remaining issues in this case to the High Court of Micronesia and limiting Federal judicial review of its disposition. Petition, 8-11. This contention is especially difficult to understand since petitioners (or most of them) originally brought the same controversy before the Trust Territory court, where it is still pending. It is unclear whether petitioners believe they initially misconceived the High Court's power to grant the relief they seek, or have simply sought relief *de novo* from the Federal judiciary because they became dissatisfied with the High Court's interlocutory rulings.

In any event, whether the Court of Appeals' decision to defer to the High Court be denominated an example of the doctrine of abstention, comity, or exhaustion of remedies, its wisdom is clear.

The High Court of Micronesia constitutes the judicial authority of the Trust Territory Government, is expressly

independent of the executive and legislative powers, and is the court of general jurisdiction for Micronesia. Dept. of Interior Order No. 2918, Part IV.

It is, therefore, that tribunal before which petitioners should seek their day in court. This is especially so since petitioners selected that forum in the first place, *Blue v. Mathena*, 259 F.Supp. 926, 928 (S.D.W.Va. 1966); and since the Court of Appeals has, in effect, found the Trusteeship Agreement to be the quasi-constitutional charter of Micronesia.[10] The High Court's jurisdiction, even if concurrent with that of the Federal courts, is entitled to priority.

Moreover, the Court of Appeals obviously intended to accord the High Court maximum deference in view of the Trusteeship Agreement's mandate for promoting Micronesian self-government. The Court has avoided entangling Micronesia in the processes of a widely removed U.S. Federal judicial system ill-equipped to resolve controversies there.

Petitioners cite cases for the proposition that the principles of comity do not apply to the courts of a territory or possession of the United States, since the purpose of pro-

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10. Since the High Commissioner acted pursuant to local statutes in granting the lease, the controversy will center upon the validity of those statutes, per se or as applied, under the Trusteeship Agreement. Petition, Appendix B, 40a. The doctrine of abstention, applicable between state and federal courts in the interest of federalism, teaches that construction of local laws should be left in the first instance to the local courts, especially where a local action involving the same parties is already pending. *Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 171-172 (1942); *Meredith v. Winter Haven*, 320 U.S. 228, 236 (1943). Application of a similar principle is appropriate here. Should the High Court, despite the Court of Appeals' clear expression of a contrary view, adhere to its own prior decisions that it cannot review the High Commissioner's acts against the Trusteeship Agreement, *Schulz v. Peace Corps*, 4 Trust Territory Reports 428 (1969); *Alig v. Trust Territory*, 3 Trust Territory Reports 603 (1967), the Federal courts are open to petitioners. Petition, Appendix B, 42a.

tecting local sovereignty is lacking. Petition, 10. Of course, the Trust Territory is not a U.S. territory or possession and is not subject to U.S. sovereignty at all. Administration of the Trust Territory, unlike that of the territories and possessions, is subject to an agreement with the United Nations calling for an ever-increasing measure of independence for the area. The tripartite-republican government now operating there (which includes the High Court) is an important step toward achieving that goal. Traditional policy considerations for applying the doctrine of comity are therefore strongly in evidence.

Since the Court of Appeals has reserved jurisdiction should the High Court (either in the first instance or on appeal) decline to accept it, Petition, Appendix B, 42a, petitioners have been deprived of no rights. Their claims to the contrary do not warrant this Court's further attention.

3. There Is No Conflict Among Lower Courts.

A number of Federal cases has considered various aspects of the relationship between the United States and the Trust Territory.[11] Only one other than the matter at bar has passed upon the precise question at issue here: the legal status of the Trust Territory Government in the exercise of its local governmental functions. That case, *Porter v. United States, supra,* 496 F.2d 583 (Ct.Cl. 1974), resolved the issue precisely as the Court of Appeals here has done. There is no need to reconcile conflicting Federal court decisions by the device of certiorari.

4. This Controversy Is Inappropriate for Intervention by the Court Now.

Pursuant to its obligations under Article 6(1) of the Trusteeship Agreement, the United States is engaged in negotiations with representatives of the Congress of Micro-

11. See authorities cited, *supra,* p. 9 and Note 9 thereon.

nesia, aimed at establishing the future political status of the area.[12] As the District Court noted, the talks will almost certainly result in a vastly altered political and legal relationship between the two peoples, and in a greatly revised structure of government for Micronesia. Petition, Appendix A, 18a, n. 23.

Under these circumstances, the writ of certiorari would:

(1) enmesh a separate and emerging people in the web of a U.S. law not designed or intended for application to them;

(2) commit this Court to a decision which, considering the evolving political situation, quite possibly will not apply to any future controversy; and

(3) frustrate the current government's legitimate efforts to promote the economic development of these barren and isolated islands.

Of course, the United States will retain its responsibilities in the Trust Territory as long as the Trusteeship Agreement remains in effect. Those responsibilities can, however, be most usefully construed by this Court, if at all, in the context of the more permanent political relationship contemplated by the status talks.

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12. The talks have been underway since 1969. The United States is represented by a Presidential envoy, Ambassador Franklin Hayden Williams; the Micronesian side by a committee of the Congress of Micronesia. During 1972, tentative agreement was reached on a "draft compact" which would place Micronesia for the immediate future in a relationship of "free association" with the United States. Under the proposal, Micronesia would attain full responsibility for its domestic affairs and its own form of government; the United States would retain responsibility for foreign affairs and defense. Difficulties have since arisen because of the differing wishes of the various districts of Micronesia, and representatives of the Marianas district (which includes Saipan) have conducted separate negotiations with the United States. See Progress Report on Trust Territory Status Negotiations, Hearing Before the House Subcommittee on Territorial and Insular Affairs, 93d Cong., 1st Sess., Serial No. 93-4 (1973).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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(Appendix Follows)

Appendix 1

Administrative Procedure Act
(5 U.S.C. §§ 701-706)

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1943, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or other-

wise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.